Supreme Court, U.S.
FILED
SEP 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

89-484

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DONALD F. HOUSTON
ROBERT B. MITCHELL
DURANT, SABANOSH, NICHOLS & HOUSTON
Counsel for Petitioner
855 Main Street
Bridgeport, Connecticut 06604
(203) 366-3438

WILLIAM H. SMITH, JR.
Counsel for Petitioner
900 Barringer Building
1338 Main Street
Columbia, South Carolina 29201
(803) 799-9087

58 pp

Questions Presented

This case involves a strike which was admittedly illegal under section 8(d)(3)[1] of the National Labor Relations Act and the enforceability of an agreement coerced by a union *during* such an illegal strike. Specifically, the question presented is: Whether, in light of the explicit provisions of sections 8(d)(3) and (4), an alleged rehire agreement secured by a union as a *precondition* to terminating an illegal strike may be enforced by the National Labor Relations Board (hereinafter "NLRB" or the "Board").[2]

---

[1] All section references are to the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 151 *et seq.* (1989) (hereinafter "NLRA" or the "Act").

[2] The parties to the above-entitled case are set forth in the caption hereof, except for the Fairfield Employees Association.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASON CERTIORARI SHOULD BE GRANTED	
The Court of Appeals' decision creates a conflict among the circuits respecting proper interpretation of sections 8(d)(3) and (4) of the Act	5
CONCLUSION	13
APPENDIX:	
Order and Opinion of the United States Court of Appeals for the Second Circuit, Filed June 5, 1989	1a
Order and Opinion of the United States Court of Appeals for the Second Circuit, Filed July 25, 1989	3a
Decision and Order of the National Labor Relations Board, Dated January 31, 1989	4a

Page

Decision and Recommended Order of Administrative Law Judge Marion C. Ladwig, Dated June 24, 1988 ..... 7a

Sections 1,7,8(a) and (d), 9(a), 10(a) and (b) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 151, 157, 158(a) and (d), 159(a), 160(a) and (b) (1989) 30a

TABLE OF AUTHORITIES

Cases	Page
Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Div., 404 U.S. 157 (1971)	10
Boeing Airplane Co., 103 N.L.R.B. 1025 (1953), *modified on other grounds*, 217 F.2d 369 (9th Cir. 1954)	9
D.H. Overmyer Co. v. Frick Co., 405 U.S. 174 (1972)	12
Fort Smith Chair Co., 143 N.L.R.B. 514 (1963), *aff'd sub. nom., United Furniture Workers of America, AFL-CIO v. National Labor Relations Board*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964)	10
Local Union 219, Retail Clerks International Association, AFL-CIO v. National Labor Relations Board, 265 F.2d 814 (D.C. Cir. 1959)	9
Mackay Radio & Telegraph Co., Inc., 96 N.L.R.B. 740 (1951)	10
Mastro Plastics Corporation v. National Labor Relations Board, 350 U.S. 270 (1956)	7, 9
National Labor Relations Board v. Babcock & Wilcox Co., 351 U.S. 105 (1956)	11
National Labor Relations Board v. Brown, 380 U.S. 278 (1965)	11
National Labor Relations Board v. Colonial Press, Inc., 509 F.2d 850 (8th Cir.), *cert. denied sub nom., Local 203, Graphic Arts International Union, AFL-CIO v. Colonial Press, Inc.*, 423 U.S. 833 (1975)	11

Cases	Page
National Labor Relations Board v. Lion Oil Co., 352 U.S. 282 (1957)	7
Rapid Armored Truck Corporation, 281 N.L.R.B. 371 (1986)	10
Swarb v. Lennox, 405 U.S. 191 (1972)	12
United Furniture Workers of America, AFL-CIO v. National Labor Relations Board, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964)	5, 8, 9, 10, 12
Statutes	
28 U.S.C. § 1254 (1) (1988)	2
28 U.S.C. § 2350 (1988)	2
29 U.S.C. §§ 151 *et seq.* (1989)	*Passim*
Other Authorities	
2 S.E. Morrison, H.S. Commager, W.E. Leuchtenburg, *The Growth of the American Republic*, 621-22 (7th ed. 1980)	6
93 *Cong. Rec.* 3839 (1947)	6
15A C.J.S. *Condonation* at 343 (1967)	11

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Fairprene Industrial Products Company, Inc. (hereinafter "Fairprene" or the "Company") prays that a writ of certiorari issue to review the June 5, 1989 judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case.

Opinion Below

The opinions of the Court of Appeals and of the National Labor Relations Board, 292 N.L.R.B. No. 84, appear in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 5, 1989. Fairprene petitioned the Court of Appeals for rehearing and rehearing *en banc* on June 19, 1989. The order of the Second Circuit denying Fairprene's petition for rehearing was entered on July 25, 1989. This petition for a writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2350 (1988).

Statutory Provisions Involved

Sections 1, 7, 8(a) and (d), 9(a), 10(a) and (b) of the NLRA, 29 U.S.C. §§ 151, 157, 158(a) and (d), 159(a), 160(a) and (b) (1989), are set out in their entirety in the Appendix hereto.

Statement of the Case

On January 30, 1987, the union representing Fairprene's production, maintenance, shipping and office employees, the Fairfield Employees Association (hereinafter the "FEA" or the "Union"), told Fairprene that it intended to terminate its collective bargaining agreement then in effect with Fairprene. Several bargaining sessions were held during February and March 1987, but the parties failed to reach a successive agreement. On March 30, 1987, the FEA notified Fairprene that it would strike at the expiration of the agreement. As was found by the Board, however, the FEA failed to serve the required section 8(d)(3) notice of its intention to strike with either the Federal Mediation and Conciliation Service (hereinafter the "FMCS") or the Connecticut Department of Labor.

On April 1, 1987, all except three of Fairprene's approximately 100 bargaining unit employees struck Fairprene; unbeknownst to Fairprene, the required section 8(d)(3) notices still had not been filed. The Board found that the strike was illegal under sections 8(d)(3) and (4). The parties stipulated that the strike was not an unfair labor practice strike. Pursuant to section 8(d)(4), the strikers lost their "employee" status and their rights

under sections 8, 9 and 10 of the Act and could not regain such status or the Act's protection unless and until they were reemployed. These facts are not in dispute.

On April 3, 1987, as a *precondition* to ending its illegal strike, the Union demanded that Fairprene agree to reinstate the illegal strikers. The Board found that Fairprene agreed to this Union demand in order to end the strike. Approximately two hours *after* making that agreement, Fairprene first learned of the strike's illegality by receiving confirmation that the required section 8(d)(3) notices had not been filed. Fairprene then decided to act on its section 8(d)(4) rights by not reinstating fifteen of the illegal strikers. Fairprene informed the FEA of its decision that same afternoon and individually denied those fifteen strikers reemployment on April 6, 1987 when 85 other strikers were allowed to return to work.

The Board's complaint, issued on September 29, 1987, alleged, *inter alia*,[3] that Fairprene had violated sections 8(a)(1), (3), (4) and (5) by not reinstating the fifteen illegal strikers. The Board contended that the Company and the FEA reached a full and enforceable agreement to settle the strike by the April 3rd agreement to reinstate all of the striking employees.

Fairprene's Answer, filed on October 5, 1987, denied the Complaint's charges and affirmatively alleged that (i) the strike was unlawful under section 8(d)(3); and, therefore, (ii) the Company's decision not to reinstate certain of the admittedly illegal strikers was proper under section 8(d)(4).

A hearing was held before Administrative Law Judge Marion C. Ladwig (hereinafter the "ALJ") on February 29 and March 1, 1988.

---

[3] Only the section 8(a)(5) finding and the underlying sections 8(a)(1), (3) and (4) findings are involved in this Petition. Two findings of independent violations of sections 8(a)(1) and (3), based on the Company's inquiry as to an employee's strike intentions and its request that another employee remove a strike sign from the work floor, are not at issue here.

In his Decision and Recommended Order, dated June 24, 1988 (7a-29a), the ALJ found the strike illegal and recognized that, during such a strike, the Company was privileged to discharge all of the strikers.[4] Nevertheless, the ALJ rejected the Company's affirmative defenses, finding that Fairprene, as a condition to ending the illegal strike, had agreed with the Union on April 3, 1987 to reinstate all of the strikers and that the strikers had thereby regained their statutory employee status and protection under sections 8, 9 and 10 at the moment the reinstatement offer was made. According to the ALJ, the alleged rehire agreement constituted "reemployment" within the meaning of section 8(d)(4), even though Fairprene remained subject to the coercive pressure of an illegal strike at the time the agreement was allegedly made and the employees had not yet in fact returned to work.

The NLRB issued its ruling on January 31, 1989 (4a-6a). The Board adopted the ALJ's Decision and Recommended Order and directed Fairprene to reinstate the fifteen illegal strikers with back pay.

Fairprene filed a petition for review with the United States Court of Appeals for the Second Circuit on February 13, 1989. The Board cross-petitioned to enforce its Order. By its decision of June 5, 1989, the Second Circuit Court of Appeals denied Fairprene's petition for review and granted the Board's request that its Order be enforced (1a-2a).

Fairprene petitioned for rehearing and rehearing *en banc* on June 19, 1989. That petition was denied without opinion by the Second Circuit on July 25, 1989 (3a). The mandate issued in this case on August 3, 1989 and Fairprene moved on August 8, 1989, pursuant to Fed. R. App. P. 41(b), to recall the mandate pending its application to this Court for a writ of certiorari.

---

[4] The ALJ stated that:

> "While the illegal strike continued, each of the strikers lost 'his status as an employee of the employer,' as mandated by Section 8(d) of the Act. During this time the Company was privileged to discharge any of the strikers it chose." (22a).

On August 28, 1989, the Second Circuit denied, without a hearing and without opinion, Fairprene's motion to recall the mandate.

REASON CERTIORARI SHOULD BE GRANTED

The Court of Appeals' decision creates a conflict among the circuits respecting proper interpretation of sections 8(d)(3) and (4) of the Act.

The Appellate decision in this case conflicts with the ruling of the Court of Appeals for the D.C. Circuit in *United Furniture Workers of America, AFL-CIO v. National Labor Relations Board*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964). The Second Circuit's ruling also runs directly counter to the literal language of and policies underlying sections 8(d)(3) and (4). Certiorari should be granted so that this Court can resolve the inter-circuit conflict caused by the Second Circuit's ruling and so that the Court can settle the important questions of federal labor law put at issue by this case.

A labor strike is coercive; it is intended to force concessions from an unwilling employer. It is labor's ultimate weapon and, therefore, one which has been carefully regulated by Congress since at least the passage of the NLRA in 1935. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449, *codified at*, 29 U.S.C. §§ 151-166.

The Second Circuit's decision in this case sorely threatens the policy and statutory underpinnings fundamental to the NLRA's regulatory construct as it exists today. Those underpinnings take their form in, *inter alia*, sections 8(d)(3) and (4) which require that labor unions notify the FMCS and concerned state agencies prior to commencing strike actions and which proscribe the loss of employee status and protection under the Act as the punishment for failing to give the required notices.

Sections 8(d)(3) and (4) were added to the Act as part of the 1947 Taft-Hartley Amendments. Labor-Management Relations

Act of 1947, ch. 120, 61 Stat. 1361, *codified at*, 29 U.S.C. §§ 151-167. This major revision of the 1935 Wagner Act was prompted by a period of intense and crippling labor strife immediately following World War II; a period of economic warfare that, in 1946 alone, saw 4.6 million workers on strike, cost 116 million man-days of work, resulted in federal seizure of a strike-threatened national railroad system and culminated in a presidential request that Congress grant authority for the drafting of strikers into the military service. 2 S.E. Morrison, H.S. Commager, W.E. Leuchtenburg, *The Growth of the American Republic*, 621-22 (7th ed. 1980). Taft-Hartley was passed by Congress, against this background, to curb perceived union abuses of the rights that had been afforded labor by the original NLRA.[5] Sections 8(d)(3) and (4)'s notice requirements and section 8(d)(4)'s "loss of status" provisions were added to the Act in order to draw boundaries and set firm rules for the commencement and exercise of economic warfare between labor and management.

Senator Taft himself emphasized that section 8(d)(3)'s pre-strike notice provision was intended first, to afford the disputing parties time for free collective bargaining, and second, to allow for intervention by the federal and state mediation services. 93 *Cong. Rec.* 3839 (1947).

A strike undertaken in accordance with the Act's rules is legal. However, a strike begun in violation of sections 8(d)(3) and (4) constitutes illegal and unprotected coercion. Most importantly, pursuant to section 8(d)(4), a union's failure to follow sections

---

[5] NLRA's policy statement was rewritten to set the tone for the Taft-Hartley Amendment:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers and members have the intent or necessary effect of burdening the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed." 29 U.S.C. § 151 (1989).

8(d)(3) and (4)'s mandatory notice procedures *before* commencing an economic strike results in an *absolute* forfeiture of protection for the union *and* its illegal strikers under sections 8, 9 and 10.[6]

During the entirety of an illegal strike, indeed, until *each* illegal striker is *individually* reemployed, such strikers cannot look to the Act or the Board to protect their otherwise valid workplace interests. By their individual participation in the illegal strike, the strikers have forfeited their section 8(d) collective bargaining rights, their section 8(a) unfair labor practice protection, the right to a section 9 collective bargaining representative, and the section 10 jurisdiction of the Board to protect them from what might otherwise be held to be unfair labor practices. One result, among others, of an illegal striker's section 8(d)(4) disability, is to subject the striker to discharge by the illegally struck employer at the employer's sole discretion unless and until that striker is "reemployed" as provided for by section 8(d)(4).

---

[6] This Court, in *Mastro Plastics Corporation v. National Labor Relations Board*, 350 U.S. 270 (1956), a case which involved an unfair labor practice strike, clarified the dual purpose of the Act (to protect employee organizational rights and, at the same time, to promote labor peace) as it was amended in 1947, as follows:

> "Section 8(d) seeks to bring about the termination and modification of collective bargaining contracts without interrupting the flow of commerce or the production of goods, while §§ 7 and 8(a) seek to insure freedom of concerted action by employees at all times." 350 U.S. at 284;
>
> "Section 8(d), thus, seeks during this natural negotiation period, to relieve the parties from the economic pressure of a strike or lockout in relation to the subjects of negotiation. The final clause of § 8(d) also warns employees that if they join a proscribed strike, they shall thereby lose their status as employees and, consequently, their right to reinstatement." 350 U.S. at 286; and
>
> "Such reference does not expand the scope of § 8(d). It merely makes it clear that *if* § 8(d) is violated by the employees to which it applies, then they lose their status as employees for the purposes of §§ 8, 9 and 10." 350 U.S. at 289 (emphasis in original).

See also, National Labor Relations Board v. Lion Oil Co., 352 U.S. 282 (1957).

Section 8(d)(4), thus, disenfranchises illegal strikers from the Act's protection. Congress provided that their disability would continue until they are rehired by the injured employer, thus, ending their illegal coercive activity.

As the Board found, the illegal strikers in this case had not yet returned to work when the rehire agreement between the FEA and Fairprene was confected. Indeed, the Board concluded that the Union made that rehire agreement a *precondition* to its halting the illegal strike. The Board's ruling and the Second Circuit's affirmance permit illegal section 8(d)(3) strikers to rely upon rehire agreements, wrung out of their employers by means of the very coercion sections 8(d)(3) and (4)'s notice requirements prohibit, as a means to evade section 8(d)(4)'s "loss of status" prescribed to punish their misconduct. Worse than this, the Circuit Court's ruling would allow future illegal section 8(d)(3) strikers to look to the Board to enforce similar agreements. In so ruling, the Second Circuit has taken a position directly contrary to the plain language of section 8(d)(4)'s "loss of status" provision, the clear Congressional purpose that supports section 8(d) as a whole, and the Circuit Court's ruling in *United Furniture Workers*.

In *United Furniture Workers*, the D.C. Circuit held that:

> "The strike being unlawful, the participants in it became subject to a lawful power of discharge in the employer; and the exercise of that power could not result in a violation by the employer of Sections 8(a)(3) and (1)." 336 F.2d at 742.

That case, as the one at bar, concerned an economic strike undertaken without the filing of the required sections 8(d)(3) and (4) notices. In that case, as in this, the Company refused to reinstate the strikers, although, again as in *Fairprene*, it did rehire some of them. Unlike Fairprene, which rehired all but fifteen of 100 illegal strikers, the employer in *United Furniture Workers* refused reemployment to a majority of its former workers, concluded the union had lost its status as majority employee representative and refused to bargain with it any longer. The *United Furniture Workers* Court confirmed the section 8(d) propriety of the company's actions. As the Circuit Court held:

> "The facts so hypothesized are, of course, the case now before us. The earlier assumption as to the legal significance of such facts seems to us sound and of continuing validity. Its application here means, at the least, that the strike was unlawful from its inception, and that, accordingly, it was a concerted activity unprotected by Section 7 of the Act, and, therefore, the discharge of those employees participating in it was not unlawful." 336 F.2d at 741.

The Appellate Court's holding in *Fairprene* directly contradicts the *United Furniture Workers* decision. The D.C. Circuit recognized that strikers who violate sections 8(d)(3) and (4)'s notice provisions have no recourse to sections 8, 9 and 10 of the Act and no section 7 protection whatever. Its ruling accorded with the Act's statutory language and policies. *See Mastro Plastics Corporation v. National Labor Relations Board*, 350 U.S. 270 (1956) (A policy "to substitute collective bargaining for economic warfare..."); *Local Union 219, Retail Clerks International Association, AFL-CIO v. National Labor Relations Board*, 265 F.2d 814, 817 (D.C. Cir. 1959) (by section 8(d) Congress set "a very high value on peaceful adjustment, i.e., the absence of strikes.").[7] By contrast, the Second Circuit's decision permits the

---

[7] The Board and Second Circuit *Fairprene* rulings also contradict established prior Board section 8(d) precedent.

In *Boeing Airplane Co.*, 103 N.L.R.B. 1025 (1953), *modified on other grounds*, 217 F.2d 369 (9th Cir. 1954), the Board stated about section 8(d)(4) that:

> "the participants in the strike lost their status as employees for the purpose of sections 8, 9 and 10 of the Act. Lodge 751 lost its status as bargaining representative. When the strike terminated, the Respondent had a free hand with respect to the strikers. It could have refused, as it did, to reinstate some of them. It could, as it did, take others into its employ with the status of new hires and in jobs other than those held before the strike began. ...All these actions seem clearly to be permitted by the statute and constitute, in effect, a sort of penalty against those who disregard the requirements of Section 8(d)." 103 N.L.R.B. at 1091-92.

(*Footnote continued*)

Fairprene strikers to claim sections 8(d) and 9's collective bargaining rights, even during the existence of the illegal strike, to invoke the intervention of the NLRB under section 10 and to gain the protection of sections 8(a)(1), (3), (4) and (5).[8] The distinction of the rehire agreement that has been the focus of

---

The Board reconfirmed the severity of sections 8(d)(3) and (4) violations in *Fort Smith Chair Co.*, 143 N.L.R.B. 514 (1963), *aff'd sub nom., United Furniture Workers of America, AFL-CIO v. National Labor Relations Board*, 336 F.2d 738 (D.C. Cir.), *cert. denied*, 379 U.S. 838 (1964). It said:

> "Moreover, apart from the foregoing, we find that Respondent's motive in discharging the strikers is not a relevant consideration. The strike here was an unlawful and not merely an unprotected activity, and by engaging in such a strike, the employees forfeited their rights to protection of the Act. To hold otherwise would, in effect, protect the strikers in their unlawful conduct, a result clearly in collision with the Board's responsibility to discourage such conduct." 143 N.L.R.B. at 518.

Even in the context of illegal strikes of less statutory gravity than section 8(d)(3) violative strikes, the Board has firmly refused to aid illegal strikers. *See Mackay Radio & Telegraph Co., Inc.*, 96 N.L.R.B. 740, 743-44 (1951):

> "In view of the unlawful character of the strike, the Respondents were privileged to solicit the return of the strikers in an effort to terminate the strike, and at the end of the strike to discharge, discipline, or reinstate on their own terms employees who had participated therein."

In *Rapid Armored Truck Corporation*, 281 N.L.R.B. 371 (1986), the Board said:

> "Where the activity engaged in by the employee is the participation in an activity which contravenes the policies of the Act the employee has forfeited his right to invoke other provisions of the same statute to restore him to his job with back pay."

[8] The Second Circuit's ruling blindly deferred to the Board's decision in this case, an improper deferral in an instance, such as this one, where the Board's ruling cannot be viewed as a reasonable construction of the Act. *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Div.*, 404 U.S. 157 (1971). The Court of Appeals sought to infuse additional strength into its decision by noting that the Board's ruling did not contradict the Circuit's rulings on the condonation doctrine.

(*Footnote continued*)

the Board's rulings in this case, and which must underly the Second Circuit's own decision is a false one. It is false because that "agreement" was obtained by use of the very illegal coercion which Congress intended to preclude by the enactment of sections 8(d)(3) and (4).

The Second Circuit's ruling tells labor that it may safely ignore section 8(d)(3)'s pre-strike notice provision and conduct its own brand of economic warfare with impunity just so long as it has sufficient muscle to force illegally struck employers to

---

Whatever reliance the Second Circuit placed on the condonation theory, however, was misplaced. Condonation, a mixed issue of fact and law, was not alleged, litigated or found by the Board. It was not raised until the General Counsel's reply brief to the Second Circuit. The record is clear and undisputed that the strike's illegality was not confirmed by Fairprene until *after* the rehire agreement was made. Fairprene, thus, could not have had the knowledge of striker wrongdoing essential to a finding of condonation. *See National Labor Relations Board v. Colonial Press, Inc.*, 509 F.2d 850 (8th Cir.), *cert. denied*, 423 U.S. 833 (1975); *see also*, 15A C.J.S. *Condonation* at 343 (1967).

In *National Labor Relations Board v. Brown*, 380 U.S. 278, 291 (1965), this Court strongly cautioned against merely rubber-stamping administrative decisions which are "inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute." As Justice Brennan, writing for this Court, stated:

> "[C]ourts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, '[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' " 380 U.S. at 291-92 (citation omitted).

See also, National Labor Relations Board v. Babcock & Wilcox Co., 351 U.S. 105, 112-13 (1956).

"agree" to reemploy illegal strikers as a means of ending the walkout.[9] Such an invitation to flaunt the law is the fundamental conflict that exists between the Second Circuit's *Fairprene* decision and the D.C. Circuit's *United Furniture Workers* ruling. That distinction should be addressed and should not be seconded by this Court.[10]

---

[9] That Congress did not intend such a result was made clear by Congress itself in the manner it structured section 8(d)(4). Congress was not content to ensure its goal merely by providing that, until reemployed, unlawful strikers would lose the benefits of section 8 [which protects against discriminatory dismissals and other unfair labor practices] and section 9 [which provides for representation by exclusive representatives] of the Act. Congress emphasized its concern and intent by taking the extraordinary step of withdrawing from such unlawful strikers their right of redress to the NLRB by providing that recourse to section 10 of the Act — the section which gives the Board its jurisdiction to remedy unfair labor practices — was not to be available to an unlawful striker unless and until he was reemployed and, thus, had surrendered the coercive power of his unlawful strike.

[10] Giving effect to such illegally coerced agreements not only violates the plain wording and Congressional purpose underlying section 8(d)(4), but also contradicts basic precepts of the common law of contracts that refuse to recognize coerced agreements. *See generally D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Swarb v. Lennox*, 405 U.S. 191 (1972).

CONCLUSION

The decision in this case creates a direct conflict between the Courts of Appeals for the Second and D.C. Circuits in their respective interpretations of sections 8(d)(3) and (4) of the Act. Petitioner believes that the Second Circuit's ruling constitutes an erroneous interpretation of sections 8(d)(3) and (4), that a writ of certiorari should be granted in this case, and that the decision below should be reversed.

Petitioner therefore respectfully requests that the Court grant a writ of certiorari to the Second Circuit in this matter.

Respectfully submitted,

DONALD F. HOUSTON
ROBERT B. MITCHELL
DURANT, SABANOSH, NICHOLS
& HOUSTON
855 Main Street
Bridgeport, Connecticut 06604
(203) 366-3438

-and-

WILLIAM H. SMITH, JR.
900 Barringer Building
1338 Main Street
Columbia, South Carolina 29201
(803) 799-9087

Counsel for Petitioner
Fairprene Industrial
Products Company, Inc.

APPENDIX

Order and Opinion of the United States Court of Appeals for the Second Circuit, Filed June 5, 1989

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 89-4015
89-4031

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC.,

Petitioner-Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross Petitioner.

PRESENT: HON. JON O. NEWMAN
HON. ROGER J. MINER
HON. ROBERT J. WARD*

ORDER

Fairprene Industrial Products Co. ("Fairprene") seeks review of a National Labor Relations Board order finding that the company violated various sections of the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (1982), by discharging fifteen strikers after agreeing to reemploy them, threatening to suspend an employee for engaging in protected concerted activity, and interrogating an employee about her intentions in the event of a strike. The Board cross-petitions for enforcement of the order.

The Board's ruling that illegal strikers are "reemployed" for purposes of section 8(d) of the Act, 29 U.S.C. § 158(d), when

---

* Of the United States District Court for the Southern District of New York, sitting by designation.

a company agrees to reinstate them is a reasonable construction of the Act, entitled to deference, and is in accord with our cases on condonation. *See Confectionery & Tobacco Drivers and Warehousemen's Union v. NLRB*, 312 F.2d 108, 113 (2d Cir. 1963); *NLRB v. E.A. Laboratories, Inc.*, 188 F.2d 885, 887 (2d Cir.), *cert. denied*, 342 U.S. 871 (1951). *NLRB v. Cast Optics Corp.*, 458 F.2d 398 (3d Cir. 1972), *cert. denied*, 409 U.S. 805 (1972), is not to the contrary. Though *Cast Optics* stated that striking employees regained their status as employees when they "returned to work," the Third Circuit had no occasion to consider whether an agreement to return to work would constitute reemployment as well.

The Administrative Law Judge's finding, adopted by the Board, that Fairprene agreed to reemploy the fifteen striking workers, is supported by substantial evidence. Fairprene's refusal to reinstate the fifteen strikers after entering such an agreement violates section 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5). *Adams Iron Works, Inc.*, 221 N.L.R.B. 71, 71 (1975), *enforced without opinion*, 556 F.2d 557 (2d Cir. 1976).

The Board's findings concerning two other employees, Burt and Jackson, are also supported by substantial evidence. The Board's conclusion that the interrogation of Jackson was coercive was consistent with this Circuit's cases, *see Bryant Chucking Grinder Co. v. NLRB*, 389 F.2d 565, 567 (2d Cir. 1967), *cert. denied*, 392 U.S. 908 (1968); *NLRB v. Lorben Corp.*, 345 F.2d 346 (2d Cir. 1965), even though the Board did not discuss all of the factors this Court has identified as being among the relevant considerations.

We have considered Fairprene's other contentions and find them to be without merit. The petition for review is denied. The Board's cross-petition for enforcement of its order is granted.

JON O. NEWMAN
ROGER J. MINER
Circuit Judges
ROBERT J. WARD
District Judge

Order and Opinion of the United States Court of Appeals for the Second Circuit, Filed July 25, 1989

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 89-4015
89-4031

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC.,

Petitioner-Cross Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross Petitioner.

ORDER

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Petitioner-Cross Respondent FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INCORPORATED.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Decision and Order of the National Labor Relations Board, Dated January 31, 1989

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 39-CA-3445

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC.

—and—

FAIRFIELD EMPLOYEES ASSOCIATION

On June 24, 1988, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The General Counsel also filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

---

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. This request is denied as the record, exceptions and briefs adequately present the issues and the positions of the parties.

The judge found, *inter alia*, that Supervisor Wayne Hurd's questioning of Jackson was not coercive. The General Counsel contends that Hurd's questioning of Jackson was coercive because Hurd failed to follow the safeguards set forth in *Providence Hospital*.[2] We agree with the General Counsel.

The undisputed testimony establishes that on March 31, 1987, the day after the Union gave notice to the Company of its intention to strike at midnight on March 31, Hurd approached Jackson and asked whether she would report to work if the Union went on strike. Jackson answered that she would not report to work but that she would not picket.

In *Providence Hospital*, the Board found that if an employer asks employees whether they plan to participate in a strike, the employer must fully explain the purpose of the inquiry, assure them that it will not take reprisals as a result of their response and otherwise refrain from creating a coercive atmosphere. Hurd did not provide Jackson with an explanation for his strike inquiry, nor did he give her assurances against reprisal when he questioned her. Because Hurd did not follow the requirements set forth in *Providence Hospital*, the Respondent violated section 8(a)(1) by coercively interrogating Jackson regarding her intentions in the event of a strike.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fairprene Industrial Products Company, Inc., Fairfield, Connecticut, its officers, agents, successors and assigns shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs.

> "(a) Coercively interrogating employees regarding their intentions in the event of a strike."

---

[2] 285 NLRB No. 52, fn. 2 (1987).

2. Substitute the following for current paragraph 1(e) now lettered (f).

> "(f) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by section 7 of the Act."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. January 31, 1989.

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John E. Higgins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

Decision and Recommended Order of Administrative Law Judge Marion C. Ladwig, Dated June 24, 1988

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 39-CA-3445

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC.

—and—

FAIRFIELD EMPLOYEES ASSOCIATION

DECISION

Statement of the Case

MARION C. LADWIG, Administrative Law Judge. This case was tried at Hartford, Connecticut on February 29 and March 1, 1988. The charge was filed April 6, 1987[1] (amended May 21 and September 25), and the complaint was issued September 27 and amended at the trial.

The Union (a small unaffiliated association) called a strike on April 1 without giving the section 8(d)(3) notices. The strike ended early Friday morning, April 3, when the Union accepted the Company's last offer and the Company agreed to reinstate all the strikers. That afternoon, after receiving confirmation that the 8(d)(3) notices had not been filed, the Company discharged 15 of the former strikers for having engaged in an unlawful strike.

The primary issues are whether the Company, the Respondent, (a) unlawfully reneged on its agreement to reinstate all the strikers, (b) discriminatorily discharged the 15 former strikers, (c) discharged two of them for having been the subject of an earlier charge, and (d) unlawfully threatened and

---

[1] All dates are in 1987 unless otherwise indicated.

interrogated employees, violating section 8(a)(1), (3), (4), and (5) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following:

Findings of Fact

I. Jurisdiction

The Company, a corporation, manufactures gaskets at its facility in Fairfield, Connecticut, where it annually ships goods valued over $50,000 directly outside the State. It admits and I find that it is an employer engaged in commerce within the meaning of section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Bad Faith Bargaining*

1. Promise of no reprisals

The Union, which has represented employees at the Fairfield plant since 1951, had never before engaged in a strike. In 1984, after the Company purchased the plant from DuPont and retained all except 3 of the approximately 100 employees, the Union signed a 3-year agreement with the Company covering the following appropriate unit:

> All production, maintenance, shipping and office employees employed by Fairprene Industrial Products Company, Inc. at its Fairfield facility, excluding watchmen, executive and administrative personnel, confidential secretaries, and guards, professional employees and supervisors as defined in the Act.

Under this agreement, which was effective until March 31, 1987, the unit employees retained their Du Pont seniority. (J. Exhs. 1 & 2; Tr. 46, 110, 223.)

Human Resources Manager Anthony Tecci was the Company's chief spokesman in the February and March negotiations for a new agreement (J. Exh. 1 par. 5; Tr. 224-225). The Union sought the participation of one of the three vice presidents. (Vice Presidents Kenneth Lakich, Paul Timmons, and Michael Coco manage the plant, reporting to Chief Executive Officer Jerry Zucker in Charleston, South Carolina (Tr. 184-186).) After consulting with the vice presidents, Tecci reported back that they were too busy to attend the meetings and that he would be the chief spokesman for the Company. (Tr. 106.)

All except three of the unit employees went on strike April 1 (Tr. 47). That first day the Company sent the strikers letters (J. Exhs. 6 & 7), warning them that it would begin hiring permanent replacements Monday, April 6, and that checks for insurance premiums must be received from the strikers by that date for April coverage.

About 1 p.m. on Thursday, April 2, after the strikers began receiving the warning letters, Union President Samuel Anzolletti telephoned Tecci and said he "felt it was in the best interest of all the employees and of the Company to get everybody back to work, for the team to negotiate on a day to day basis." Tecci stated he would forward the proposal to his superiors. (Tr. 48-49.)

About 5:30 that Thursday afternoon Anzolletti, with Area Representative Joseph Indenbaum, went to the plant gate and spoke to Tecci. As credibly testified by Anzolletti (who impressed me most favorably by his demeanor on the stand as an honest, forthright witness) Tecci stated that the Union's proposal was not satisfactory, that "they felt that their proposal was a fair proposal," and that "they were no longer interested in negotiating further." Tecci added, however, that the Company was interested in "getting the plant back in operation and the Company proposed that if we accepted their last proposal there would be no reprisals then against any of the picketers." Anzolletti responded that it was obvious he would need some time to get to the people "but as a show of good faith we would pull our picket lines down." (Tr. 49-51, 127.)

As recalled by Indenbaum (who also appeared to be an honest witness) Tecci said that Anzolletti's proposal to return to work and go back to the negotiating table had been flatly rejected, but that the Company was anxious to have the employees back to work and if the Union would accept the Company's "firm and final" prestrike offer, "all the striking employees would be returned to work and that no reprisals would be taken against any of the picketers" (Tr. 128-129). Indenbaum also credibly recalled that Anzolletti said "as a gesture of good faith that we were going to suspend our picketing" (Tr. 130).

I discredit, as fabrications, Tecci's claims that (1) he made no statement about reprisals not being taken, (2) he never heard the word "reprisals" before, (3) that there was "no longer [a company] offer that was available to [the Union]," (4) he did not tell Anzolletti "what it would take to settle the strike," and (5) the vice presidents had not given him permission to tell Anzolletti that all the strikers would come back to work (Tr. 303-306, 315-317, 324). Neither Vice President Coco nor Vice President Timmons admitted authorizing Tecci to promise no reprisals. Coco claimed that he merely told Tecci to report back to Anzolletti "That his proposition was unacceptable" and "I don't know that [Tecci] asked me" what he should tell the Union the Company wanted (Tr. 229-233). Although Timmons admitted telling Tecci to inform Anzolletti that what would be acceptable to the Company was "A ratification of the new contract" (Tr. 276-281) he, like Tecci and Coco, appeared by his demeanor on the stand to be more interested in supporting the Company's cause then candidly giving a full account of what happened.

After weighing all the evidence I find that in this Thursday afternoon meeting with Union President Anzolletti and Area Representative Indenbaum, Human Resources Manager Tecci relayed the vice presidents' promise of no reprisal against any of the pickets if the Union would accept the Company's last proposal.

2. Agreement to reinstate all strikers

As promised, Union President Anzolletti removed the pickets that Thursday evening. He told the pickets to "come back

tomorrow morning, to discuss a new proposal from the Company." (Tr. 51, 130.)

About 7:30 the next morning, April 3, Anzolletti first went to the plant gate and got Human Resources Manager Tecci's permission for the Union membership to meet on Company property to vote on the Company's new proposal (Tr. 51-52, 306-307, 323). He then met with the membership that was congregated on the front lawn (Tr. 53).

As Anzolletti credibly testified, he presented "the proposal that we received from the Company the night before," explaining that it was exactly the same as before the strike except that "there would be no reprisals against any of the picketers." He stated he was concerned about strikers crossing the picket lines Monday morning "because they couldn't afford to pay the insurance premiums," about there being a violent confrontation, and about a prolonged strike. He said he "felt it was in the best interest of all parties concerned that they accept management's proposal." The membership then "elected to go back to work." (Tr. 54-55.)

Anzolletti signed a note that Union Moderator Pete Geoghan had handwritten (J. Exh. 9; Tr. 55). It read: "The Fairfield Employees Association will ratify the proposed contract by management and will report Monday April 6th, 1987." Anzolletti asked Former Union President Paul Pelletier to accompany him to the plant gate to talk to Tecci (Tr. 56). As they started walking toward the gate David Kiley, another former union president, stopped Anzolletti and told him, "Sam, make sure all the people are coming back." As Kiley credibly testified, Anzolletti "said okay." (Tr. 348.)

At the plant gate about 8:30 Anzolletti, holding the note in his hand, spoke to Tecci. As Anzolletti credibly testified (Tr. 56-58):

> I said, "Tony . . . I just took a vote from my membership" and he asked me if I had anything for him . . . I said, "Yeah, I have something for you, but there's some questions I want to get clear first . . . the first thing I'd like to ask you is I want to make sure all my

> people are coming back to work Monday" and he simply said "Yes." And then I told him that we had . . . three people scheduled for a layoff that . . . Friday, and I asked him if it would be possible if he could have the paperwork [done]. He responded by telling me that [Human Resources Assistant] Susan Cunningham was in the plant somewhere, wasn't sure where she was, if he could get in touch with her . . . he would get the paperwork made out and those guys could come in and get their pink slips and if not they'd have to come back Monday.
>
> I also asked him about the three individuals that I couldn't get in contact with . . . I asked for his assistance to call 'em up and tell 'em the strike was ended and to report to work Monday.
>
> I also asked him about the individuals that were working shift and those people that had been scheduled off . . . Monday in the Mechanical Department. He said [if] you were weren't sure who should be scheduled off or if you were supposed to work, or if you weren't sure what shift you were supposed to be on, to call your supervisor and ask him.
>
> And then I asked him [once] more, I just wanted to make sure that all my people come back to work Monday, and he said yes and I handed him [the note].

They then scheduled a meeting for 10 o'clock Monday morning to initial agreed changes in the collective-bargaining agreement and discussed Anzolletti's taking a vacation day.

Former Union President Pelletier, who was standing "to the right side of the guard shack" on Anzolletti's left (Tr. 120), recalled (Tr. 117-119) that

> Mr. Tecci came out and the guard went back in the guard shack and myself, Sam, Mr. Tecci were left standing outside.

Sam told Mr. Tecci that he had a letter for him but he wanted a few things cleared up first and the first question he asked was, "Is everyone going back, there is going to be no retaliation, everyone is going back." And Mr. Tecci said, "Yes, everyone is going back, no retaliation."

And then Sam went on to ask him, "Okay, when are we going back? Do you want us to go back today?" Mr. Tecci said, "No, Monday will be find [sic]."

Then Mr. Anzolletti asked him . . . "Well, how about the mechanics that work Tuesday through Friday, do you want them coming in on Monday?" Mr. Tecci said, "No, just have them come in on their regular time."

Mr. Anzellotti also said to Mr. Tecci that he wanted a [vacation] day Monday, and Tony [said], "Yeah, fine, no problem with that."

And . . . Mr. Anzolletti also asked . . . "Well, what happens to these people that are laid off" and Mr. Tecci said, "Well, have them come in and I will make the arrangements."

Then Mr. Anzolletti gave Mr. Tecci the note and walked away.

Q. Do you recall anything that Mr. Anzolletti said just before he gave him the note?

A. No, I don't.

(By his demeanor, Pelletier impressed me as an honest witness.)

Human Resources Manager Tecci and Vice Presidents Coco and Timmons all gave testimony to dispute that there was any agreement to reinstate all the strikers. Tecci claimed that Anzolletti did not say anything before handing him the note (Tr. 308-309, 330). He also claimed that "To the best of my recollection, no" there was not anyone else present (Tr. 327, 330). Both Coco and Timmons were watching through office windows. Both claimed that there was no conversation before Anzolletti

handed Tecci the paper. They also claimed that Anzolletti was alone – contrary to the credited testimony by Anzolletti, Pelletier, and the rebuttal witnesses, current employees Kiley (Tr. 348) and Katherine Lamson (Tr. 338). Coco claimed that the meeting lasted 30 to 45 seconds, certainly "less than a minute," and Timmons claimed 30 to 40 seconds, "maybe 45 seconds, no more." (Tr. 200-205, 241, 248-255, 270-271, 292-297.) I discredit these claims as fabrications.

There was also conflicting testimony about when the Company decided which day the strikers could return to work. Vice President Timmons recalled that after this second (8:30) meeting Tecci reported that Anzolletti asked if they should return to work that day and he said no, Monday would be more appropriate (Tr. 295). Former Union President Pelletier similarly recalled (as quoted above) that Anzolletti asked Tecci "Do you want us to go back today?" and Tecci answered, "No, Monday will be fine."

In contrast Tecci recalled that in the first meeting that morning Anzolletti stated that if the employees voted to accept the proposed contract, "they were ready to come back to work that day" and that Tecci responded "I thought Monday would be best," but "I told him I would get back to him after the discussion [with his membership]." Tecci claimed that he then reported this to the vice presidents (after the first meeting, not after the second meeting as Timmons recalled) "and they agreed." (Tr. 332-334.) Anzolletti recalled asking Tecci at the 7:30 meeting "if the membership elected to agree to the [company proposal] did he want them back to work that morning," and Tecci "informed me that the Company felt that the week was basically shot and Monday morning was soon enough" – without any mention of Tecci getting back to him after the vote. I credit Anzolletti's recollection and also Pelletier's testimony that Anzolletti asked the question at the second meeting (getting a confirmation).

I find that the credible evidence supports the General Counsel's contention that the Company, in the negotiations to end the strike, agreed to reinstate all the striking employees if the Union accepted the Company's last offer. In the 8:30 meeting

that Friday morning, after the Company's authorized spokesman twice confirmed the Company's reinstatement promise, the Union accepted the contract offer, ending the strike.

3. Discharge of former strikers

Throughout these negotiations to settle the strike, Human Resources Manager Tecci concealed from Union President Anzolletti the information that the Company was considering the possibility of discharging some of the employees for engaging in the strike. Tecci admitted (Tr. 320):

> Q. And you kept that information from him; correct?
>
> A. . . . I did not reveal that information; no, sir, I didn't.
>
> Q. Did it occur to you that that might be some information that the union would be interested in?
>
> A. I followed the directions of my vice presidents and that was never brought up.

About 10 a.m. on Thursday (the second day of the strike) the vice presidents conferred with Chief Executive Officer Zucker about the indication that the Section 8(d)(3) notices had not been filed with the appropriate Federal and state agencies. Vice President Coco testified that Zucker's "feeling was that, if indeed, the strike was an illegal strike, we had the option to not rehire people that we felt might not be in the best interest of the long-term goals of Fairprene" (Tr. 194-195).

When Anzolletti first called about 1 o'clock that Thursday, trying to settle the strike, Tecci was already making telephone calls — as requested by the company attorney — to ascertain if the notices had been sent (Tr. 313-314). Tecci admitted on cross-examination that Anzolletti said "it was time to get employees back to work."

Q. And you said you felt the same way?

A. Yes, sir.

Q. Now, did you tell him at that point that the company was considering the possibility of getting rid of some of the employees because the strike was illegal?

A. No, sir, I did not.

Q. Now . . . you knew there was a possibility at that point that the strike was illegal?

A. There was a possibility; yes, sir.

The Company continued to conceal this information from Anzolletti when he arrived at the plant gate about 5:30 that Thursday afternoon with Area Representative Indenbaum, continuing his efforts to negotiate a strike settlement. Despite the possibility that the Company would decide to discharge some of the strikers, Tecci (as found above) relayed the vice presidents' promise of no reprisals against any of the pickets.

Shortly after this meeting, about 6 p.m. as credibly testified by Production Supervisor David Vayda (who appeared on the stand to be an honest, forthright defense witness), the vice presidents met with the salaried employees. After production problems were discussed, the supervisors were informed "that the strike is possibly an illegal strike." They were asked, if they "did not have an obligation to hire back any or all of the employees," to ponder over that evening which employees they felt would not be in the best interest of the Company to rehire. (Tr. 172-173).

The strike ended before the Company confirmed the Union's failure to file the required 8(d)(3) notices.

The Company, by amending its last proposal (promising no reprisals against the strikers), succeeded in settling the strike. Union President Anzolletti immediately removed the pickets that Thursday evening, and early Friday morning the union membership voted to accept the new proposal and return to work.

The strike ended about 8:30 a.m., April 3, when Anzolletti presented the Union's handwritten note, agreeing to "ratify the proposed contract by management." This occurred at the plant gate after Human Resources Manager Tecci (the Company's chief spokesman in all the negotiations) twice confirmed the Company's agreement to reinstate all the strikers and scheduled all except three of them to return to work the next week on their regular shifts. These three (unidentified) employees were to be given pink slips and laid off from their employment, as previously planned.

Although the pickets were gone and the strike had been settled, the Company proceeded that Friday morning to get a list of the former strikers who the supervisors felt were not "in the best long-term interests of the company" (Tr. 39-40, 173-174, 205-208, 246, 271-272, 297-298). Then, after Tecci finally confirmed around 10 or 10:30 a.m. (Tr. 37) that the required notices of the labor dispute had not been filed, the vice presidents met a "good three hours" (Tr. 273). As Vice President Coco testified, they discussed first, "whether or not we should exercise this option" of not retaining some of the employees, second, "how many employees it should involve," and third, "who those employees are" (Tr. 208).

Despite the fact that the former strikers were already scheduled to return to work, the vice presidents decided to proceed with their "option." They reduced the list from 24 to 14 names, added the name of the employee Larry Burt (discussed below), and decided to discharge 15 of the employees (Tr. 246-247, 299). About 2:30 that Friday afternoon, at the conclusion of the meeting, the vice presidents gave Tecci the list of 15 names (Tr. 208, 273) without informing him why any of them was being discharged (Tr. 30). They instructed him to "contact legal counsel and be certain of the wording that should be placed in a letter" to the Union (Tr. 209).

After preparing the letter as instructed (with legal advice), Tecci called Union President Anzolletti to the plant and handed him the letter about 3:30 p.m. (Tr. 19-20, 58-59, 311). Although

Tecci positively denied on the stand that he considered the strike to be over at that time (Tr. 19), the letter bearing his signature (J. Exh. 10) belies the denial. After pointing out the Union's failure to file the section 8(d)(3) notices, the letter refers to the strike in the past tense and to the returning "employees."

> The strike *was* unlawful
>
> . . . .
>
> Since the strike *was* unlawful, every striker has made himself or herself subject to lawful discharge.
>
> We do not wish to take such drastic action. We also understand that the employees have voted to return to work, agreed to Fairprene's last offer, and the Union wishes to meet with us at 10:00 A.M. on Monday April 6, 1987 to conclude the contract.
>
> On those conditions we welcome the return of the great majority of you to our continuing business relationship.
>
> However, in the best interest of Fairprene and of our returning *employees*, we feel that certain of the unlawful strikers should not be returned to work.
>
> The following persons will not be permitted to return to work at Fairprene, and are discharged . . . . [Emphasis added.]

I find that the Company's contention that the strike continued until Monday morning is an afterthought.

The letter listed the following discharged persons:

Valerie Adintori	Doris Jackson	George Pospisil
Larry Burt	Kurt Kalaus	Ralph Toms
Maureen Dirga	Warren Kalaus	Leslie Wargo
Rodney Hoheb	David Nelson	Clarence Wheeler
Joseph Indenbaum	Paul Pelletier	Richard Womic

It came as a complete surprise to Anzolletti. Not only had the Company assured him twice that morning that "all my people are coming back to work Monday," but he had never heard about Section 8(d)(3) of the Act (Tr. 59, 86, 88). As found, the Union had never engaged in a strike.

Anzolletti immediately contacted the Union's attorney and joined with him in drafting a reply to Tecci (Tr. 59-60, 101-102; J. Exh. 12), stating in part:

> I agreed on all contract terms with you in the morning of April 3, 1987. At that time, we agreed that all employees would be brought back .... I hope you will agree to your original settlement proposal and avoid substantial legal proceedings.

About 10 a.m. Monday, April 6, Anzolletti handed the letter to Tecci at the initialing of the agreed changes (J. Exh. 11) in the collective-bargaining agreement (Tr. 60). (The new agreement (J. Exh. 17), effective from April 6 to April 5, 1990, was signed May 26.) On April 7 Tecci responded (J. Exh. 13), stating in part:

> On Friday morning, early, your Union took some kind of show of hands vote at Fairprene's front lawn. Shortly after that occurrence you asked to see me at the front gate and handed me a handwritten note ....
>
> I read the note, told you that Management was anxious to have the employees return to work, but that I would get back to you. You said the Union would meet with us at 10:00 A.M. Monday to agree to Fairprene's proposal. That is the whole substance of our exchange.
>
> I made you no promises. Your note stated that the Union had already decided to ratify the contract on Monday.
>
> On Friday, April 3, 1987, several hours after the events between us, on Friday morning, we received information ... that your Union had not given ... notice of a labor dispute....

> With these new facts, new actions were called for. The strike was unlawful, a fact we had not known until finally verified.

Meanwhile early Monday morning, April 6, Tecci met each of the 15 discharged employees at the plant gate and told them they would not be permitted to return to work because "it would not be in the best interest of Fairprene" (Tr. 23-24).

4. Contentions of the parties

The General Counsel concedes in her able brief (at 23) that employees "who engage in a strike in violation of Section 8(d) may be discharged for discriminatory reasons because they are no longer employees." *Fort Smith Chair Co.*, 143 NLRB 514, 518 (1963), *enfd. sub nom. Furniture Workers Local 270 v. NLRB*, 336 F.2d 738 (D.C. Cir. 1964). She contends however (at 26) that when the Company agreed to reinstate all the strikers and the Union agreed to end the strike, the strikers at that point had been "reemployed" within the meaning of Section 8(d). "The statute does not require that the employees 'return to work' . . . to regain employee status. Therefore, the strikers once again became statutory employees."

She argues (at 25) that "to allow [the Company] to renege on its agreement to reinstate all the strikers would fly squarely in the face of the purposes of the Act in general and of Section 8(d) in particular." She later argues (at 28):

> The sanction of loss of employee status provides a powerful incentive for labor organizations to provide the notice mandated under Section 8(d)(3). . . . the involvement of mediation services is intended to encourage the peaceful resolution of labor disputes. However, once the parties have resolved their dispute, as the parties in this case had, no further statutory purpose is served by allowing employers to exercise [this] punitive power. Once an unlawful strike has ended, there is no longer any reason to deprive employees of the protections of the Act.

The Company in its brief (at 9) makes the contention (found above to be an afterthought) that the strike did not end until the first shift Monday morning, April 6, when "all but the fifteen strikers were returned to work." Also relying (at 3) on the Board's decision in *Fort Smith Chair Co.*, above, as well as the court's opinion on review, the Company contends (at 5) that until Monday morning, all the strikers lost their status as employees and the Union was not their bargaining representative. Regarding the allegation that on April 3 the Company and Union reached a full settlement agreement through which the Company agreed to reinstate all striking employees, the Company besides arguing credibility contends (at 5-6):

> One does not "settle" unlawful activity. The unlawful participants are required to cease and desist, and the strikers had not yet ceased and desisted.
>
> The strike was an unlawful strike in violation of Section 8(d)(3) of the Act and therefore Section 8(d)(4) stripped the strikers of all employee status . . . . There was, thus, not only no duty to negotiate, it was not possible to negotiate while the unlawful 8(d)(3) strike was continuing [citing no authority for this extreme position].
>
> . . . .
>
> . . . It was impossible under the law for the [Union] . . . to negotiate on any matter involving the strikers. The strikers were not Fairprene's employees. The strikers were not members of the collective bargaining unit representative [sic] by the [Union]. The [Union] had no status whatever to negotiate on their behalf. The Act makes it that way [without explanation].

The Company concludes (at 29) that all the Union's testimony relating to the Company's alleged agreement to reinstate all striking employees is "irrelevant to the Section 8(d)(3) [and] (4) circumstances created by themselves."

5. Concluding findings

While the illegal strike continued, each of the strikers lost "his status as an employee of the employer," as mandated by Section 8(d) of the Act. During this time the Company was privileged to discharge any of the strikers it chose.

But the Company chose instead to negotiate a settlement of the strike and resume normal production. It did so by promising to [make no] reprisals and agreeing to reinstate all the strikers. Early Friday morning, April 3, the union membership voted to accept the Company's last offer — with this addition — and to return to work. The Company scheduled the employees to return on their regular shifts beginning Monday morning, April 6, and the strike ended.

Several hours later, after receiving confirmation that the Union had failed to file the required 8(d)(3) notices, the Company reneged on its promise to reinstate all the participants in the strike. It decided to proceed with its preparations to discharge the former strikers who it believed were not "in the best long-term interests of the company." About 3:30 p.m., April 3, it notified the Union that its strike had been unlawful and that 15 of the former strikers were discharged.

The Company waited too long to discharge the strike participants. Section 8(d) provides that the "loss of status" for the employee "shall terminate if and when he is reemployed." I find, in agreement with the General Counsel, that when the full strike settlement agreement was reached and the Company rescheduled the employees to return to work, the strike ended and the strikers were "reemployed" within the meaning of that Section 8(d) provision.

I therefore find that by reneging on its promise to reinstate all the strikers, the Company engaged in bad faith bargaining and violated Section 8(a)(5) and (1) of the Act.

B. *Section 8(a)(3) and (4) Violations*

With the exception of Larry Burt (whom the vice presidents added to the supervisors' list of former strikers to be considered for possible discharge (Tr. 182-183, 247, 299-300)), the Company has given no specific reasons for each discharge.

The General Counsel presented the following evidence to make a prima facie case that 12 of the 15 former strikers (omitting Rodney Hoheb, George Pospisil, and Ralph Toms) were discharged because of union and protected concerted activities and that 2 of the 12 were discharged also because they were the subject of an earlier NLRB charge.

Valerie Adintori lived with Leslie Wargo, who had been a union representative about 17 years (Tr. 30).

Larry Burt had been a union representative (Tr. 150). His workmanship, attendance, and punctuality were good and his personnel file contained no record of any disciplinary action (Tr. 33, 181). Although he wore a masking-tape sign reading "Go on strike" on the back of his shirt about a week before the strike until required to take it off (as discussed below), his supervisor did not recommend his discharge (Tr. 181).

Maureen Dirga testified for the Union in an arbitration of the bonus plan (Tr. 158-160), engaged in other union activity and was told by a supervisor that "he was dead set against anybody being involved with unions" (Tr. 160-161), and complained in writing to Vice President Lakich (Tr. 161). Her personnel file contained no record of any disciplinary action.

Joseph Indenbaum was an area representative and was on the Union's nine-member negotiating committee (J. Exh. 1 par. 5). His personnel file contained no record of any disciplinary action (Tr. 36). In addition, he had complained of disparate treatment and, with David Nelson, was the subject of an NLRB charge filed by the Union (Tr. 122-126; J. Exh. 3).

Doris Jackson testified against the Company in an arbitration case on behalf of the Union (Tr. 137).

Kurt Kalaus was the Union's recording secretary and was on the Union's negotiating committee (J. Exh. 1 par. 5). He had been a union representative about 7 years (Tr. 34).

Warren Kalaus is the father of Kurt Kalaus. His personnel file contained no record of any disciplinary action and his workmanship, attendance and punctuality were good (Tr. 34-35).

David Nelson's personnel file contained no record of any disciplinary action (Tr. 36). In addition he, with Indenbaum, was the subject of an NLRB charge filed by the Union.

Paul Pelletier had served as the Union's president (Tr. 114) and as a union representative about 14 years (Tr. 35). He was on the Union's negotiating committee (J. Exh. 1 par. 5). In his last appraisal, his supervisor said "he had ranked me among the top employees in his department" (Tr. 119).

Leslie Wargo was an area representative and was on the Union's negotiating committee (J. Exh. 1 par. 5). He had been a union representative about 17 years (Tr. 30).

Clarence Wheeler had a pending grievance against the Company at the time of his discharge (Tr. 142).

Richard Womic had been a union representative about 11 years (Tr. 164) and his personnel file contained no record of any disciplinary action (Tr. 36). He had filed a grievance that was taken to arbitration (Tr. 165-167).

I find that the General Counsel has made a prima facie showing sufficient to support the inference that union and protected concerted activities were a motivating factor in the discharge of these 12 employees and that the naming of Indenbaum and Nelson on an earlier NLRB charge was also a motivating factor in their discharges. As the General Counsel points on in her brief (at 28), "The record establishes that a disproportionately high portion of union officers, activists and their relatives were included among the employees terminated. Many were long-term employees with good employment records, and none were given any reason for their selection." Concerning Indenbaum

and Nelson being the subject of an earlier charge, I agree with the General Counsel (at 28 fn. 6) that "An employer violates Section 8(a)(4) by discriminating against employees because they are named on an unfair labor practice charge filed by someone else." *Cafe LaSalle*, 280 NLRB No. 43, JD slip op. at 33-34 (June 18, 1986).

I find it clear that the Company has failed to rebut the General Counsel's prima facie case by carrying its burden to demonstrate that it would have discharged the 12 former strikers in the absence of the protected activities, or Indenbaum and Nelson if they had not been the subject of an earlier charge. *Wright Line*, 251 NLRB 1083, 1089 (1980). The Company had not discharged, or even reprimanded, Burt after he removed the sign from his shirt the week before the strike.

I therefore find that the Company on April 3 discriminatorily discharged the 12 employees in violation of Section 8(a)(1) and (3) and Indenbaum and Nelson also in violation of Section 8(a)(4).

C. *Threat and Interrogation*

Sometime during the week before the strike, Human Resources Manager Tecci saw Burt leaving the lunchroom from his break, wearing a handprinted masking-tape sign "Go on strike" on the back of his shirt. Tecci told him to take the sign off, but he merely shrugged his shoulders and returned to work. He was working when Supervisor Vayda arrived and asked him to take the sign off. Burt continued to refuse to remove the sign until, in the office, Tecci told him "you'll have to go home until you take the sign off." Upon the intervention of two union representatives, Burt took off the sign and Tecci said, "Okay, let's drop the issue . . . the thing's over, let's everybody get back to work." (Tr. 61-62, 115-116, 150-157, 169-172, 174-176.)

Contrary to the Company's contentions in its brief (at 27) that the threatened suspension was based on Burt's (1) failure to comply with the bulletin-board provision in the agreement (J. Exh. 2 p. 27), (2) violation of the no-strike clause (pp. 30-31), and (3) direct interference with production, I find that the threat was

based on the disfavored content of the prounion message on the sign he was wearing. I therefore find that the Company coerced Burt in the exercise of his Section 7 rights in violation of Section 8(a)(1) of the Act. *Publishers Printing Co.*, 246 NLRB 206 at 206 fn. 4 and 209 (1979), *enfd*, 650 F.2d 859 (6th Cir. 1981).

On the afternoon of March 31, after the Union gave notice to the Company of its intention to strike at midnight (J. Exh. 5), Supervisor Wayne Hurd approached employee Doris Jackson and asked if she would come in if the Union went on strike. She answered no, she would not come but she would not picket. (Tr. 137.) I find that the General Counsel has failed to prove that Hurd's question tended to be coercive. I therefore find that the allegation of coercive interrogation must be dismissed.

Conclusions of Law

1. By agreeing to reinstate all the striking employees but refusing since April 3 to reinstate the following 15 employees after the strike ended, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act:

Valerie Adintori	Doris Jackson	George Pospisil
Larry Burt	Kurt Kalaus	Ralph Toms
Maureen Dirga	Warren Kalaus	Leslie Wargo
Rodney Hoheb	David Nelson	Clarence Wheeler
Joseph Indenbaum	Paul Pelletier	Richard Womic

2. By discriminatorily discharging the following 12 employees because of union and protected concerted activities it violated Section 8(a)(1) and (3):

Valerie Adintori	Doris Jackson	Paul Pelletier
Larry Burt	Kurt Kalaus	Leslie Wargo
Maureen Dirga	Warren Kalaus	Clarence Wheeler
Joseph Indenbaum	David Nelson	Richard Womic

3. By discriminatorily discharging employees Joseph Indenbaum and David Nelson for being the subject of a charge filed under the Act, it violated Section 8(a)(4).

4. By threatening to suspend an employee for engaging in protected concerted activity, it violated Section 8(a)(1).

5. The General Counsel has failed to prove that the interrogation of an employee tended to be coercive.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having reneged on its agreement to reinstate all the strikers and refused after the strike ended to reinstate 15 employees (12 of whom must be offered reinstatement with backpay also because of their discriminatory discharge), it must offer the 15 employees reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 20, 1978).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Fairprene Industrial Products Company, Inc., Fairfield, Connecticut, its officers, agents, successors, and assigns, shall

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing to bargain in good faith with Fairfield Employees Association as the exclusive bargaining representative of the employees in the bargaining unit.

(b) Discharging or otherwise discriminating against any employee for engaging in union or protected concerted activity.

(c) Discharging or otherwise discriminating against any employee for being named in an NLRB charge.

(d) Threatening to suspend any employee for wearing a sign with a lawful prounion message.

(e) In any like or related manner coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the following employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the refusal to reinstate them, in the manner set forth in the remedy section of the decision:

Valerie Adintori	Doris Jackson	George Pospisil
Larry Burt	Kurt Kalaus	Ralph Toms
Maureen Dirga	Warren Kalaus	Leslie Wargo
Rodney Hoheb	David Nelson	Clarence Wheeler
Joseph Indenbaum	Paul Pelletier	Richard Womic

(b) Remove from its files any reference to the refusal to reinstate and notify the employees in writing that this has been done and that the refusal to reinstate will not be used against them in any way

(c) Preserve and, on request, make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Fairfield, Connecticut copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Officer-in-Charge for Subregion 39, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Officer-in-Charge in writing within 28 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. June 24, 1988

Marion C. Ladwig
Administrative Law Judge

[3] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Statutory Provisions

Section 1 of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 151 (1989):

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife

and unrest, by encouraging practices fundamental to the friendly adjusment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 7 of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 157 (1989):

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to

the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 158(a) (1989):

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when

made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(d) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 158(d) (1989):

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such

obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification-

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties

so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159 and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

Section 9(a) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 159(a) (1989):

> **Representatives and elections**
>
> **(a) Exclusive representatives; employees' adjustment of grievances directly with employer**
>
> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Sections 10(a) and (b) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. §§ 160(a), (b) (1989):

> **Prevention of unfair labor practices**
>
> **(a) Powers of Board generally**
>
> The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in

any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(b) Complaint and notice of hearing; answer; court rules of evidence inapplicable

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed

to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(2)

No. 89-484

Supreme Court, U.S.
FILED
NOV 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

12 pp

QUESTION PRESENTED

Whether the Board reasonably concluded that certain strikers who had lost their status as "employee[s]" became "reemployed" within the meaning of Section 8(d) of the National Labor Relations Act, 29 U.S.C. 158(d), when petitioner, in a strike settlement, agreed to reinstate all of the strikers.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	9

TABLE OF AUTHORITIES

Cases:

NLRB v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987)	7-8
United Furniture Workers v. *NLRB*, 336 F.2d 738 (D.C. Cir.), cert. denied, 379 U.S. 838 (1964)	8

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 7, 29 U.S.C. 157	6
§ 8(a)(1), 29 U.S.C. 158(a)(1)	5, 6
§ 8(a)(5), 29 U.S.C. 158(a)(5)	5, 6
§ 8(d), 29 U.S.C. 158(d)	2, 5, 7
§ 8(d)(1), 29 U.S.C. 158(d)(1)	2
§ 8(d)(3), 29 U.S.C. 158(d)(3)	2, 3, 4, 8
§ 8(d)(4), 29 U.S.C. 158(d)(4)	2

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-484

FAIRPRENE INDUSTRIAL PRODUCTS COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 880 F.2d 1318 (Table). The decision and order of the National Labor Relations Board (Pet. App. 4a-6a), including the decision and recommended order of the administrative law judge (Pet. App. 7a-29a), is reported at 292 N.L.R.B. No. 84.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1989. A petition for rehearing was denied on July 25, 1989 (Pet. App. 3a). The petition for a writ of certiorari was filed on September 22, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(d)(1) of the National Labor Relations Act, 29 U.S.C. 158(d)(1), requires that a party intending to terminate an existing collective-bargaining agreement must furnish 60 days' notice of that intent to the other party to the agreement. Within 30 days after serving such notice, the party desiring termination must also notify the Federal Mediation and Conciliation Service, and the appropriate state mediation and conciliation agency, of the existence of the dispute, unless an agreement has been reached by that date (§ 8(d)(3)). In addition, Section 8(d)(4) prohibits a strike by a union seeking to change an existing agreement until 60 days after the union has given notice of termination. Finally, Section 8(d) provides that any employee who engages in a strike within any of these notice periods "shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections [8], [9] and [10] of [the Act], but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

2. Petitioner manufactures gaskets at a facility in Fairfield, Connecticut. The Fairfield Employees Association (the Union), a small unaffiliated association, has represented employees at petitioner's Fairfield plant since 1951. In January 1987, the Union notified petitioner of its intent to terminate the existing collective bargaining agreement, effective March 31, 1987.[1] During February and March, the parties negotiated for a new agreement, with Human Resources Manager Anthony Tecci acting as petitioner's principal spokesman. No agreement was reached, however, and on March 30, Union President Samuel Anzolletti informed Tecci that the Union would strike when the agreement expired on March 31. Pet. App. 8a; Gov't C.A. Br. 3-5.

[1] References hereafter are to 1987.

On Wednesday, April 1, all except three of the unit employees went on strike. Petitioner immediately notified the strikers that it would begin hiring permanent replacements on April 6. On the morning of April 2, Tecci placed telephone calls to various federal and state mediation agencies, asking whether the Union had filed the pre-strike notices required by Section 8(d)(3) of the Act. The agencies advised Tecci that there was no record of such notices, but they agreed to make a further search of the files. Thereafter, petitioner's top management discussed the possibility that if the strike were illegal, petitioner might have "the option to not rehire people that [it] felt might not be in the best interest of [petitioner's] long-term goals * * *." Pet. App. 9a; Gov't C.A. Br. 6-7.

That afternoon, after the strikers began receiving petitioner's warning letters, Anzolletti called Tecci and stated that he "felt it was in the best interest of all the employees and of the Company to get everybody back to work [and] to negotiate on a day to day basis" (Pet. App. 9a). Tecci said he would consult with his superiors. At a meeting later that day, Tecci told Anzolletti that petitioner was not interested in further negotiations; he stated, however, that if the Union accepted petitioner's last pre-strike proposal there would be no reprisals against any strikers.[2] Anzolletti replied that it would take time for him to reach his people, but that as a gesture of good faith he would remove the picket lines. Anzolletti removed the pickets that evening, and told them to return the following morning to discuss "a new proposal from the Company." *Id.* at 9a-11a.

---

[2] Shortly after Tecci gave that message to Anzolletti, Tecci's superiors met with the plant supervisors and told them that the strike might be illegal. They asked the supervisors to consider which employees it would not be in petitioner's "best interest * * * to rehire," assuming petitioner was "not obligat[ed] to hire back any or all of the employees." Pet. App. 16a.

At about 7:30 the following morning (Friday, April 3), Anzolletti went to the plant and obtained Tecci's permission for the Union membership to meet on petitioner's property to vote on petitioner's new proposal. He asked Tecci whether, if the Union agreed to the proposal, the membership should go back to work that morning. Tecci replied that the strikers could return to work on Monday. Pet. App. 11a, 14a.

Anzolletti then presented petitioner's proposal to the membership. He explained that the proposal was exactly the same as petitioner's pre-strike offer, except that there would be no reprisals against any of the strikers. The membership then voted to accept the proposal and go back to work, and Anzolletti signed a handwritten note stating that "[t]he Fairfield Employees Association will ratify the proposed contract by management and will report Monday April 6th, 1987." Pet. App. 11a.

Before handing the note to Tecci, Anzolletti asked for and received Tecci's assurance that all of the strikers would be coming back to work. Tecci directed that all employees report on Monday, April 6, or on their next scheduled workday, and he again assured Anzolletti that all of the strikers would be reinstated. After receiving that assurance, Anzolletti handed Tecci the note accepting petitioner's contract proposal and ending the strike. Pet. App. 11a-13a.

Later Friday morning—following the meeting that ended the strike—petitioner's vice president met with plant supervisors to get a list of the former strikers whose retention might not be "in the best long-term interests" of the company. Pet. App. 17a. After Tecci finally confirmed, at about 10:00 or 10:30 a.m., that the required Section 8(d)(3) notices had not been filed, petitioner selected 15 former strikers whom it proposed to discharge. Pet. App. 17a, 23a-24a.[3]

---

[3] Twelve of those selected were union officers or their relatives, or

At petitioner's request, Tecci then prepared, and delivered to Anzolletti, a letter informing the Union of the 15 discharges. *Id.* at 17a.

The letter came as a complete surprise to Anzolletti, who immediately contacted the Union's attorney. They jointly composed a letter for Anzolletti's signature, stating in part that "I agreed on all contract terms with you in the morning of April 3, 1987," and that "[a]t that time, we agreed that all employees would be brought back." Pet. App. 19a. Anzolletti handed the letter to Tecci at the Monday morning meeting at which they initialed certain agreed-upon changes in the collective-bargaining agreement. The next day, Tecci wrote back to Anzolletti, denying that he had ever made any promises to reinstate the strikers. *Id.* at 19a-20a.

3. Adopting the findings and conclusions of the administrative law judge, the Board found that petitioner had engaged in bad faith bargaining and had violated Section 8(a)(5) and (1) of the Act by reneging on its agreement to reinstate all the strikers. Pet. App. 4a-29a. The Board agreed that the strike was conducted in violation of Section 8(d), and that, while the strike continued, "each of the strikers lost 'his status as an employee of the employer' as mandated by Section 8(d)" (Pet. App. 22a). As a result, the Board continued, petitioner was entitled during such time "to discharge any of the strikers it chose" (*ibid.*). The Board found, however, that petitioner had elected instead to negotiate a settlement of the strike by agreeing to reinstate all of the striking employees if, in turn, the Union accepted petitioner's last contract offer. By so agreeing, the Board concluded, petitioner had "reemployed" the strikers within the meaning of Section 8(d), and was no longer entitled to

---

had participated in prior Board or grievance proceedings. Many were long term employees with good employment records. Pet. App. 23a-24a.

discharge them on whatever basis it chose. Pet. App. 14a-15a, 22a. The Board agreed with the General Counsel that the " 'statute does not require that employees "return to work" . . . to regain employee status' " (*id.* at 20a). It therefore concluded that "when the full strike settlement agreement was reached and [petitioner had] rescheduled the employees to return to work, the strike ended and the strikers were 'reemployed' within the meaning of [Section 8(d)]" (*id.* at 22a).

Having determined that all the strikers had been "reemployed"—thus regaining their status as statutory employees—the Board found that petitioner had engaged in bad faith bargaining by reneging on its promise to reinstate them all (Pet. App. 22a). The Board further found that petitioner had discriminatorily discharged 12 of the 15 employees based on their union affiliation or protected concerted activity (*id.* at 23a-25a). It directed petitioner to offer to reinstate and make whole all 15 of the affected employees (*id.* at 27a).[4]

4. The court of appeals enforced the Board's order in an unpublished decision (Pet. App. 1a-2a). The court held that the Board's ruling—that illegal strikers are "reemployed" for purposes of Section 8(d) when an employer agrees to reinstate them—"is a reasonable construction of the Act," and was therefore "entitled to deference" (Pet. App. 2a). The court also held that substantial record evidence supported the Board's finding that petitioner had agreed to reemploy the 15 striking workers. The court therefore held that petitioner had violated Section 8(a)(5) and (1) of the Act by refusing to reinstate the strikers pursuant to its agreement with the Union (*ibid.*).[5]

---

[4] The Board also found that petitioner had coercively interrogated one employee, and had coerced a second employee in the exercise of his rights under Section 7. Pet. App. 5a, 25a-26a.

[5] The court also held that there was substantial evidence to support the Board's findings that petitioner had coerced two of its employees (Pet. App. 2a). The petition does not present that issue (Pet. 3 n.3).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Under Section 8(d) of the Act, a party that desires to terminate or modify a collective-bargaining agreement must notify federal and state mediation services within 30 days after giving similar notice to the other party to the agreement. Section 8(d) further provides that an employee who goes on strike within the prescribed notice period "shall lose his status as an employee of the employer engaged in the particular labor dispute" for purposes of the Act. The Act states, however, that "such loss of status for such employee shall terminate if and when he is reemployed by such employer."

In the present case, the Board held that petitioner "reemployed" the strikers when it agreed, in a strike settlement, to reinstate all of them in return for the Union's promise to accept petitioner's last contract offer. The Union kept its part of the bargain, by accepting the final pre-strike offer and terminating the picketing. Petitioner contends (Pet. 7-8), however, that a striker is not "reemployed" until he has actually returned to work. Accordingly, petitioner reasons, the company was free to discharge 15 of the strikers—even on an otherwise discriminatory basis—since the strikers had not yet returned to work, and had therefore not yet been "reemployed."

The statute does not define the term "reemployed." As the court below concluded (Pet. App. 2a), the Board's interpretation of that term—according to which a striker is "reemployed" once the employer evidences an intent to resume a normal employer-employee relationship—is reasonable and thus entitled to deference. See *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S.

112, 123-124 (1987). Petitioner challenges that construction, contending (Pet. 8-12) that the Board's interpretation encourages unions to coerce employers to reinstate unlawful strikers. Whatever merit that contention may have in other contexts, no claim of coercion can be made on this record.[6] To the contrary, the record shows that petitioner maintained the upper hand throughout the dispute. Prompted by petitioner's warning that it would start hiring permanent replacements, the strikers, through their union representative, offered to return to work almost immediately, without a contract. The strikers also agreed to remove the picket line, as a gesture of good faith. Pet. App. 9a. Moreover, there is no evidence to suggest that petitioner offered to reinstate the strikers only because it was "coerced" into doing so.

2. Petitioner contends (Pet. 8-10) that the decision below conflicts with the D.C. Circuit's decision in *United Furniture Workers* v. *NLRB*, 336 F.2d 738, cert. denied, 379 U.S. 838 (1964). There is no merit to that claim. In *United Furniture*, the court of appeals sustained an employer's decision to fire certain employees who had engaged in a strike without having furnished the required Section 8(d)(3) notices. But in that case, the unlawful strike was still in progress when the strikers were discharged. Moreover, there was no showing in *United Furniture* that the employer had agreed, prior to the discharge, to reinstate the strikers.[7] In the present case, by contrast, petitioner fired all 15 strikers

---

[6] Moreover, it is difficult to see how "coercion" – whatever that term means in this setting – is more likely to occur if the term "reemployed" is interpreted to include not only return to work but also an agreement to reinstate.

[7] Indeed, at a negotiating session held with a federal mediator the day before the strikers were discharged, "the Company made plain, with the Union's acquiescence, that its participation in that meeting was with a full reservation of whatever rights accrued to it by reason of the Union's failure to give the Section 8(d)(3) notices." 336 F.2d at 740 n.2.

after the strike was settled, and in derogation of its agreement to reinstate them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

NOVEMBER 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—262 203/00618